



SUPPLEMENTAL REPORT

TO: District of Columbia Zoning Commission

FROM: *JL for* Jennifer Steingasser, Deputy Director
Development Review and Historic Preservation

DATE: September 26, 2016

SUBJECT: **ZC 15-32 – Supplemental Report** for Consolidated Planned Unit Development (PUD) with PUD-related Map Amendments for 1126 9th Street NW – Zoning Administrator response to the NCPC filing for this case

As part of this Planned Unit Development (PUD) proposal to construct a new multi-family building at 1126 9th Street NW, the applicant requested setback relief for mechanical penthouse structures. In its advisory memo regarding ZC Case 15-32, the National Capital Planning Commission (NCPC) noted that the proposal is “inconsistent with the Comprehensive Plan for the National Capital and other federal interests due to a minimal violation of the penthouse setback requirements of the Act to Regulate the Height of Buildings in the District of Columbia” (Exhibit 37). At its public meeting of September 12, 2016, the Commission requested an opinion regarding this matter from the Zoning Administrator, who is charged with interpreting the Height Act.

The Zoning Administrator opinion is attached. In summary, the memo notes that the NCPC conflated setback requirements under the Height Act and those of the zoning regulations which, by long standing interpretation of the Height Act, are different from setback requirements under zoning. Under the Height Act, the 1:1 setback has consistently been interpreted as being required from exterior walls fronting onto a street, which this proposal provides. Under the Zoning Regulations, setbacks are also required from other exterior walls, for which the applicant has requested relief. The Zoning Administrator memo also describes a number of cases, both recent and past, by current and past Zoning Administrators, in which this opinion has been upheld by the Zoning Commission. Recent penthouse related changes to the Height Act and to the zoning regulations do not impact this interpretation.

As such, the Zoning Administrator stated in the opinion that the proposal is not in conflict with the Height Act with respect to penthouse setback, although the applicant has correctly requested relief from separate penthouse setback requirements of the zoning regulations.

OP will also forward the Zoning Administrator memo to the NCPC for future reference.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



September 23, 2016

Joel Lawson
D.C. Office of Planning
1100 4th Street, SW, 6th Floor
Washington, DC 20024

Re: Zoning Commission Case No. 15-32 – 1126 9th Street, NW (the “Property”)

Dear Joel:

I am providing this letter to you in response to the referral of the above-captioned case to me from the District of Columbia Zoning Commission (“**Commission**”). This letter contains my interpretation of the Height Act of 1910 in relation to the project (the “**Project**”) proposed in the above-captioned case.

Background

The instant application before the Commission requests approval of a consolidated Planned Unit Development and amendment to the Zoning Map from DD/C-2-A to DD/C-2-C for a portion of the Property (collectively, the “**PUD**”). The PUD would, among other things, authorize construction of a taller building element located mid-block. This element of the building rises to a height of 100 feet and includes a roof structure (“**Penthouse**”) of 14 feet on the roof of such element. The Penthouse is set back from M Street, NW to the north by approximately 81 feet, 8 inches and from 9th Street, NW to the east by approximately 60 feet. The Penthouse is not set back from the property line and façade to the south and is immediately adjacent to a neighboring property and setback 32 feet from the edge of the rear wall of the Project to the west.

On July 7, 2016, the Commission took Proposed Action to approve the PUD. The applicant requested relief from the Zoning Regulations from the setback requirements on the north, west and south sides of the Penthouse and such relief was approved as part of Proposed Action. On September 14, 2016, the National Capitol Planning Commission (“**NCPC**”) submitted an advisory memo dated September 11, 2016 (the “**NCPC Memo**”) into the record as Exhibit 37. The NCPC Memo stated that the Project violates the 110-foot allowable maximum height by four feet and is not setback from the north and south “exterior walls” as required by the Height Act because any portion of the Penthouse above the 110 foot limit of height established by the Height Act requires setback of one foot from the “exterior wall” for each foot in height. The NCPC Memo notes that the Penthouse setback along 9th Street is compliant with the Height Act and appears to conclude that the Penthouse configuration along the west (alley) side of the Project is compliant with the Height Act.

1100 4th Street, SW 3rd Floor Washington, D.C. 20024
Phone: (202) 442-4576 Fax: (202) 442-4871

Precedent and General Concepts

The concept of what constitutes an “exterior wall” requiring a one-to-one setback under the Height Act has been well settled for many years. Under the Height Act, an exterior wall is one that adjoins a street, and a project may be in compliance with the Height Act’s setback requirements even when it is not in compliance with those of the Zoning Regulations. The recent change in the penthouse setback requirements under the Z.C. Order 14-13 does not alter previously held interpretations of the setback requirements under the Height Act (although the NCPC Memo appears to incorporate new zoning interpretations to affect amended interpretations of required setbacks under the Height Act). Moreover, the Zoning Commission has consistently deferred to the Zoning Administrator interpreting the Height Act.

An instructive case relating to the interpretation of required roof structure setbacks under the Height Act is ZC Case No. 93-9C for the GWU/WETA project at 21st and H Streets NW (“GWU/WETA”). In that case, the Zoning Administrator, in a letter to the director of the Office of Zoning dated November 24, 1993, stated that “[T]he setback requirements of a roof structure under provisions of the [Height Act] have always been interpreted by the Zoning Division as being required to be set back from the property line which adjoins a street. Consequently, it is my opinion that the Zoning Commission, under a Planned Unit Review, does have authority to waive the setback of a roof structure from a property line which does not adjoin a street.” (Emphasis added.) The District of Columbia Office of Attorney General submitted a letter into the record in GWU/WETA endorsing the Zoning Administrator’s determination. By letter dated February 17, 1994, NCPC concurred and acknowledged that there are “many buildings in the District of Columbia on which elevator penthouses are not set back from exterior walls which do not face streets but rather face adjoining buildings, alleys, or courtyards.” NCPC’s letter concluded that “for at least forty years, and probably longer, those local entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street.” Under the Height Act, exterior walls adjoin a street.

The Zoning Administrator has more recently re-affirmed the rule applied in GWU/WETA and reaffirmed that a project may be in compliance with the Height Act even while requiring relief from the Zoning Regulations. In ZC Order No. 07-18 for 1000 F Street, NW, the Commission, relying upon the Zoning Administrator’s review of the configuration and the project in light of the Height Act (i) approved a roof structure that was not set back from an abutting alley or adjacent wall and was above the Height Act maximum height maximums, and (ii) granted relief from the Zoning Regulations for the roof structure (as it did in the instant case). As part of the record in 1000 F Street, NCPC submitted a memo questioning the roof structure’s lack of setback from the walls adjoining an alley and neighboring lot. The applicant therein submitted a response memo citing the lengthy history of determinations that “exterior walls” for the purpose of the Height Act are limited to those that adjoin streets and arguing that the relevant walls were therefore not “exterior walls”. That project was approved by the Commission. NCPC raised similar objections in ZC Case No. 07-13 for the Randall School at 65 I Street, SW. Again the Zoning Administrator interpreted the roof structure setbacks as compliant with the Height Act, and the Commission deferred to the Zoning Administrator’s determination. Numerous other buildings above the Height Act height maximums in the District lack the roof structure setbacks that NCPC seeks as well.

Application of Zoning Administrator Interpretations the Project and Conclusion

In the instant case, the Penthouse complies with the Height Act under the longstanding interpretation that the relevant “exterior walls” of the Project from which the required setbacks are to be measured are those that adjoin a street.

Here, under the Height Act, the relevant setback distance for the Penthouse on the north is to be calculated from the Project’s wall immediately adjoining M Street, NW and the setback on the east is to be calculated from the Project’s wall immediately adjoining 9th Street NW. While the north façade is street-fronting, the Project does provide a one-to-one setback for the Penthouse from the relevant lower “exterior wall” adjoining M Street. For the north setback in particular, the roof structure setback required by the Height Act along M Street begins at the edge of the building adjoining M Street, at the top of the 5th floor (at a height of 51’ 8”). While the top of the roof structure rises to a height of 114’ and is therefore ~62’ 4” above the roof of the building that adjoins M Street, the roof structure is set back ~81’ 8” from such M Street façade.

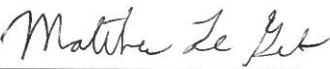
No setbacks are to be required from walls interior to the lot – those on the south or west of the Project. Accordingly, the Penthouse complies with the Height Act’s setback requirement, and there is no violation thereof. It is irrelevant to the inquiry under the Height Act that the Project required relief under the applicable Zoning Regulations. The penthouse requirements of the Zoning Regulations, including the required setbacks from exterior walls, do not change the Zoning Administrator’s interpretations of the Height Act.

For the purposes of the Zoning Regulations, the north, west and south facades of the uppermost roof plane *do* constitute “exterior walls” from which a one-to-one setback would be required (after Z.C. Order 14-13 became effective). The applicant requested, and the Zoning Commission granted, this special exception relief as part of their Proposed Action vote on July 7, 2016. The Applicant detailed its zoning relief request and the justification therefore in its Pre-Hearing Filing on April 12, 2016 (Exhibit 12 in the record). The determination regarding the “exterior walls” requiring roof structure setbacks under the Zoning Regulations is different from the determination of what constitutes an “exterior wall” requiring setbacks under the Height Act.

I would greatly appreciate your informing the Commission of my interpretation of the Height Act in regards to this Project at the Commission’s Public Meeting on September 26, 2016.

Please let me know if you have any questions.

Thank you for the time to review this letter.

Sincerely, 
Matthew Le Grant
Zoning Administrator